79-174

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

October Term, 1979

No. _____

DAVID JOHNSON and ANTHONY VIGIL,

Petitioners,

- vs. -

MOTOR VEHICLE DIVISION,
DEPARTMENT OF REVENUE,
STATE OF COLORADO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

RICHARD M. BORCHERS
3489 West 72nd Avenue, Suite 201
Westminster, Colorado 80030

WAYNE E. STOCKTON
3489 West 72nd Avenue, Suite 201
Westminster, Colorado 80030

Attorneys for Respondents David Johnson and Anthony Vigil
On Behalf of the American Civil Liberties Union of Colorado

INDEX

Page

CITATIONS TO OPINIONS BELOW 1

JURISDICTION 2

QUESTION PRESENTED FOR REVIEW 2

STATUTORY PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 5

I. THE OPINION OF THE SUPREME COURT OF THE STATE OF COLORADO CONFLICTS WITH DECISIONS OF THIS HONORABLE COURT 5

II. A CONFLICT ON THIS ISSUE NOW EXISTS BETWEEN THE HIGHEST COURTS OF THE STATE OF COLORADO AND INDIANA REQUIRING A RESOLUTION BY THIS HONORABLE COURT 7

III. THE ISSUE INVOLVED HERE IS OF SUCH IMPORTANCE AS TO REQUIRE A RULING BY THIS HONORABLE COURT 8

CONCLUSION 9

APPENDIX

A. Opinion of the Supreme Court of the State of Colorado 10

B. Denial of Petition for Rehearing 16

C. Summary Judgment Order of District Court 17

TABLE OF AUTHORITIES

	Page
Cases:	
Bell v. Burson, 402 U.S. 535 (1971)	5
Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc., ___ Ind. ___, 380 N.E.2d 1225 (1978)	7
McDaniel v. Paty, 435 U.S. 618 (1978)	6
Sherbert v. Verner, 374 U.S. 398 (1963)	6
Torcaso v. Watkins, 367 U.S. 488 (1961)	6
Wisconsin v. Yoder, 406 U.S. 205 (1972)	6
Wooley v. Maynard, 430 U.S. 705 (1977)	6
Constitutional Provisions:	
United States Constitution First Amendment	6
Statutes:	
28 U.S.C. 1257(3)	2, 3
C.R.S. 42-2-106(3) (1973)	2, 5

In the
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October Term, 1979

No. _____

DAVID JOHNSON and ANTHONY VIGIL,

Petitioners,

- vs. -

MOTOR VEHICLE DIVISION,
DEPARTMENT OF REVENUE,
STATE OF COLORADO,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT

OF THE STATE OF COLORADO

The Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Colorado entered on April 30, 1979, with the petition for rehearing being denied on May 21, 1979.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of the State of Colorado is reported at 593 P.2d 1363(1979) and is set out in the Appendix, infra at p. 10. The denial of the petition for rehearing is set out in the Appendix, infra at p. 16. The decision of the District Court of the City and County of Denver is unreported, but is set out in the Appendix, infra at p. 17.

JURISDICTION

The judgment of the Supreme Court of the State of Colorado was entered on April 30, 1979. The petition for rehearing was denied on May 21, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED FOR REVIEW

Whether Petitioners, members of the religious order of the Assembly of YHWHHOSHUA, were denied their rights under the First Amendment of the United States Constitution to freely exercise their religious beliefs when they were denied driver's licenses by the State of Colorado for refusing to be voluntarily photographed, which is prohibited by their religious beliefs?

STATUTORY PROVISION INVOLVED

Section 42-2-106(3), Colorado Revised Statutes (1973)

> "Every application for a driver's, minor driver's, or provisional driver's license, and a license issued as a result of said application shall also contain the photograph of the applicant or licensee. Such photograph shall be taken and processed with equipment leased or owned by the Department."

STATEMENT OF THE CASE

The Petitioners are members of a small religious group located near Pueblo, Colorado, known as the Assembly of YHWHHOSHUA. As members of this group, they believe that the Bible instructs them not to allow photographs to be taken of themselves. Petitioners base their belief on a literal interpretation of the Second Commandment, as pronounced in Exodus 20:4, which directs that:

> "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth."

Because of their beliefs, Petitioners will not allow themselves to be voluntarily photographed.

Respondent is the administrative agency established by the Legislature of the State of Colorado to administer and enforce motor vehicle laws. Respondent is required by Colorado law to make available to the public and to act upon license applications for the right to drive within the State of Colorado. One of the requirements which Respondent has been enforcing is the requirement that every application for a driver's license within the State of Colorado shall have a photograph of the applicant thereon, pursuant to C.R.S. 42-2-106(3) (1973).

Petitioners have made application to obtain driver's licenses with the Respondent, but have been refused such a driver's license without a photograph being taken and placed upon the license. Respondent has maintained throughout the entire course of this litigation that the photograph requirement is mandatory, and has therefore refused to issue any driver's licenses to Petitioners without their voluntarily submitting to being photographed.

On June 23, 1977, Petitioners filed an action for declaratory relief in the District Court of the City and County of Denver requesting a judicial determination that C.R.S. 42-2-106(3) (1973) was unconstitutional as applied to Petitioners and requesting injunctive relief directing Respondent to issue driver's licenses to the Petitioners without photographs, if they were otherwise found to be qualified for such a license. Respondent, through its answer filed in response to the Petitioners' complaint, admitted that Petitioners are members of a recognized religious body and that they have a bona fide and sincere belief that graven images may not be made of themselves. No dispute has ever been made by Respondent as to the sincerity of the belief of Petitioners in this case. See Opinion of the Colorado Supreme Court, infra at Appendix p. 12.

Summary judgment was requested by both sides before the District Court of the City and County of Denver.

Petitioners' motion for summary judgment was denied without hearing on January 30, 1978, and on May 5, 1978, the trial judge issued his order granting summary judgment for the Respondent. Appendix, infra at p. 17. The trial court ruled that there was a substantial state interest as a matter of law. An appeal was filed directly with the Supreme Court of the State of Colorado.

On April 3, 1979, the Supreme Court of the State of Colorado affirmed the decision of the District Court of the City and County of Denver, with Justice Pringle dissenting. The court below found that Respondent had presented a compelling state interest. Respondent had claimed that a photograph was a unique means of identification and was necessary in order to provide a police officer with an instantaneous means of determining if the person bearing the license was the same one to whom it was issued. Respondent had further argued that a photograph was needed because of the nature of a driver's license being used as an "identification card" and that there must be negatives available for use in police photographic line-ups and for use in identifying natural disaster victims.

The Supreme Court of the State of Colorado upheld the Respondent and ruled that the "State's interest in photographic identification is so compelling that the appellant's challenge must fall." See Opinion of the Supreme Court of the State of Colorado, infra at Appendix p. 15. In so finding, the court rested its determination on the reported uniqueness of a photograph.

> "The department asserts that a photograph is a unique method of identification and assists in the identification of those who operate motor vehicles. Appellants contend that a driver's license which was marked by their thumbprint would suffice. However, only a photograph can provide a police officer who makes a traffic stop with a ready and instantaneous means of determining that the person tendering the driver's license is indeed the person to whom the license was issued. (Cit.omit) The exigencies of law enforcement cannot brook the delay inherent in other means of identification.

> Moreover, the State asserts other interests besides those directly relating to the function of a driver's license. A driver's license and the Colorado State 'identification card', which also must bear the possessor's photograph, (cit. omit) are the only recognized statewide means of ready identification. The department also maintains a file of the negatives from which the driver's photographs are developed. The negatives provide a unique method of identification for use in police photographic line-ups and offer means for identifying victims of natural disaster and traffic accidents."

Appendix at p. 13-14. On this basis the Supreme Court of the State of Colorado held that the provisions of the First Amendment of the Constitution must fall by the wayside because of a "compelling" state interest in requiring a photograph on a driver's license.

Petitioners filed a petition for rehearing before the Supreme Court of the State of Colorado which was denied on May 21, 1979. Petitioners request this Honorable Court to issue a writ of certiorari under jurisdiction granted by 28 U.S.C. 1257(3).

REASONS FOR GRANTING THE WRIT

I.

THE OPINION OF THE SUPREME COURT OF THE STATE OF COLORADO CONFLICTS WITH DECISIONS OF THIS HONORABLE COURT

The necessity to be able to drive in modern America is undisputed. Driving has become a protected right requiring due process of law before the same may be taken away by a state. *Bell v. Burson*, 402 U.S. 535(1971). It has never been disputed by Respondent or the Supreme Court of the State of Colorado that Petitioners have a need to drive an automobile in order to obtain and maintain employment, and to carry on the practice of their religion and to attend their religious services. See Opinion of the Supreme Court of the State of

Colorado, *infra* at Appendix p. 13. Respondent has also acknowledged and concedes that Petitioners are otherwise qualified to obtain driver's licenses and to drive safely on the roads of the State of Colorado.

In arriving at its decision, the Supreme Court of the State of Colorado attempted to distinguish this Honorable Court's decision in *Sherbert v. Verner*, 374 U.S. 398 (1963). The lower court believed that the interest involved in *Sherbert* of unemployment compensation was not the same as present in this case. The lower court did not discuss at all this Honorable Court's decisions in *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (state interest in requiring mandatory education overridden by First Amendment); *McDaniel v. Paty*, 435 U.S. 618 (1978) (interest of state in prohibiting ministers from holding public office overriden by First Amendment); *Wooley v. Maynard*, 430 U.S. 705 (1977) (state cannot require ideological message to be carried on license plates of those who religiously object); and *Torcaso v. Watkins*, 367 U.S. 488 (1961) (requiring a belief in God in order to hold public office held to be improper). These cases all conflict with the analysis of the lower court, and Petitioners further believe that the lower court failed to properly analyze *Sherbert v. Verner* and misapplied the First Amendment of the United States Constitution in this case.

Petitioners have been denied the right to drive on the highways of the State of Colorado only because they refuse to voluntarily allow photographs to be made of themselves. In order for them to obtain a driver's license, they must give up their belief that a graven image not be made of themselves. Petitioners believe that the stated need of a police officer to have instantaneous identification cannot outweigh the rights guaranteed by the First Amendment, and that the other issues set forth by Respondent are extraneous to the issue of whether or not one is qualified and able to drive safely.

The decision of the Supreme Court of the State of Colorado conflicts with previous decisions of this Honorable Court Petitioners request that this Honorable Court issue a writ of certiorari for this reason.

II.

A CONFLICT ON THIS ISSUE NOW EXISTS BETWEEN THE HIGHEST COURTS OF THE STATE OF COLORADO AND INDIANA REQUIRING A RESOLUTION BY THIS HONORABLE COURT

The very same issue presented in this case was also reviewed by the Supreme Court of the State of Indiana in *Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc.*, ____ Ind. ____, 380 N.E.2d 1225 (1978). The decision of the lower court in that case was completely opposite from that of the Supreme Court of the State of Colorado.

The Supreme Court of the State of Indiana was presented by the state with virtually the same arguments as advanced by Respondent.

> "While we agree that the state has a strong interest in insuring competency, the idea that the photograph requirement is necessary to that interest is patently absurd. We do not see how having one's photograph on a drivers license can make one a more competent driver. The Bureau's argument that the photograph requirement gives it a means of speedy, positive identification, thus aiding the Bureau in the performance of its duty to insure safe roads in Indiana, is more compelling. Normally we would not question the state's need for administrative efficiency in an area as broad and complex as is involved in the licensing of Indiana drivers. However, we feel that there are other alternatives available to the Bureau which would satisfy this purpose without impinging on the rights of these appellees. For example, the statistics which are traditionally included on a driver's license, such as license number, height, weight, eye and hair color, have long proven adequate to enable the Bureau to fulfill its important duties . . ."

Ibid at p. 1229. The Petitioners could now obtain a driver's license in the State of Indiana, but in order to do so they will have to move. The decisions of the two lower courts could not be more diametrically opposed.

As a conflict now exists on this issue between the highest state courts in Colorado and Indiana, a resolution should be made by this Honorable Court. For this reason, Petitioners pray that this Honorable Court will grant the petition and issue a writ of certiorari.

III.

THE ISSUE INVOLVED HERE IS OF SUCH IMPORTANCE AS TO REQUIRE A RULING BY THIS HONORABLE COURT

Petitioners believe that the issue involved here is constitutionally significant enough to require a final decision by this Honorable Court. The opinion of the Supreme Court of the State of Colorado is at odds with previous decisions of this Honorable Court and is out of step with the rights provided under the First Amendment of the United States Constitution.

Petitioner cannot be issued a driver's license within the State of Colorado for the sole reason that they cannot voluntarily allow themselves to be photographed. The lower court acknowledged, as had Respondent, that Petitioners need to drive to attend their religious services and to maintain employment. There is no question that Petitioners' right to worship is curtailed because they cannot get to their services. Against this acknowledgement, the lower court found a "compelling" interest so great as to deny Petitioners the right to drive. Petitioners believe that their rights under the First Amendment and their right to travel are being infringed and that no compelling interest does exist to deny them a driver's license.

Because of the importance of the issue involved in this case, this Honorable Court should grant the petition and issue a writ of certiorari.

CONCLUSION

For the reasons set forth herein, the Petitioners respectfully pray that this Honorable Court will grant the Writ to the Supreme Court of the State of Colorado.

Respectfully submitted,

RICHARD M. BORCHERS
3489 West 72nd Avenue, #201
Westminster, Colorado 80030
303-426-1770

WAYNE E. STOCKTON
3489 West 72nd Avenue, #201
Westminster, Colorado 80030

APPENDIX A

IN THE SUPREME COURT
OF
COLORADO

No. 28171

DAVID JOHNSON, ANTHONY VIGIL, and BRENT PERKINS,	)	
Plaintiffs–Appellants,	)	
v.	)	Apr. 30 1979
MOTOR VEHICLE DIVISION, DEPARTMENT OF REVENUE, STATE OF COLORADO,	)	
Defendant-Appellee.	)	

Appeal From the District Court in and for the

City and County of Denver

Honorable George M. McNamara, Judge

EN BANC JUDGMENT AFFIRMED

Richard M. Borchers,
Wayne E. Stockton,

Attorneys for Plaintiffs-Appellants.

J. D. MacFarlane, Attorney General,
David W. Robbins, Deputy Attorney General,
Edward G. Donovan, Solicitor General,
Richard H. Forman, Assistant Attorney General,
General Legal Services Section,

Attorneys for Defendant-Appellee.

MR. JUSTICE ERICKSON delivered the Opinion of the Court.

This appeal was taken from a summary judgment in favor of the Motor Vehicle Division of the Department of Revenue, appellee. The appellants filed an action for a declaratory judgment and for injunctive relief to invalidate the provisions of section 42-2-106(3), C.R.S. 1973, asserting that their right to religious freedom was being infringed upon by an unconstitutional application of the statute. We affirm the entry of summary judgment by the trial court.

The appellants are members of a religious organization known as the Assembly of YHWHHOSHUA. They believe that the Bible directs that they not allow any photograph to be taken of them. They base their belief on a literal interpretation of the second commandment, as pronounced in *Exodus* 20:4, which directs that:

> "Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth."

See also Deuteronomy 5:8.

The Motor Vehicle Division of the Department of Revenue has the duty to issue driver's licenses in accordance with the laws of the State of Colorado. Although appellants are conceded to be in all other respects eligible to receive a license to drive, the department has refused to issue them a driver's license because the appellants will not be photographed. The department's refusal to issue a license is predicated on section 42-1-206(3). C.R.S. 1973, which provides:

> "(3) Every application for a driver's, minor's license, or provisional driver's license, and the license issued as a result of said application, shall also contain the photograph of the applicant or licensee. Such photograph shall be taken and processed with equipment leased or owned by the department."

Appellants seek to have section 42-2-106(3) declared unconstitutional, insofar as it applies to them, on the ground that any requirement that they be photographed before they

may be issued a driver's license violates their right to the free exercise of their religion, as guaranteed by the Colorado Constitution (Article II, Section 4), and by specific provision of the First Amendment to the United States Constitution, which commands that:

> "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . ."

This mandate was made binding on the states in *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). The religious nature of the appellants' belief and practices are conceded, and their sincerity is not questioned. *See Fellowship of Humanity v. County of Alameda*, 153 Cal.App.2d 673, 693, 315 P.2d 395, 406 (1967). Of course, any inquiry into the truth or falsity of appellants' belief is forbidden. *United States v. Ballard*, 322 U.S. 78, 86, 64 S.Ct. 882, 88 L.Ed. 434 (1944).

Our analysis of appellants' contention must proceed from the premise that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). But "even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions." *Braunfield v. Brown*, 366 U.S. 599, 603, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1960).

Appellants rely primarily on *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), and *Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc.*, 380 N.E.2d 1225 (Ind. 1978), to support their position. We decline to follow the Indiana court which relied upon *Sherbert v. Verner*.

In *Sherbert v. Verner, supra*, Sherbert, a Seventh-Day Adventist, was discharged by her employer because she would not work on Saturday, the Sabbath day of her faith. She was denied unemployment compensation benefits on the ground that she had refused, "without good cause," to accept suitable

work that had been offered to her. The United States Supreme Court held that the free exercise of religion provisions of the First Amendment prevented the State of South Carolina from impinging on Sherbert's religious beliefs by denying unemployment compensation after she was terminated for refusing to work on her Sabbath.

The test employed in *Sherbert v. Verner, supra*, has been characterized as having three elements which must be weighed in determining whether the governmental interests involved "overbalance" the right to the free exercise of religion.

> "[F]irst, the importance of the secular values underlying the governmental regulation; second, the degree of proximity and necessity that the chosen regulatory means bears to the underlying value; and third, the impact that an exemption for religious reasons would have on the over-all regulatory program." Gianella, *Religious Liberty, Non-establishment, and Doctrinal Development: Part I, The Religious Liberty Guarantee*, 80 Harv. L. Rev. 1381, 1390 (1967).

In brief, the state must demonstrate that its policies are backed by a compelling state interest and that no alternative less restrictive of religious freedoms will serve. *See Pillar of Fire v. Denver Urban Renewal Authority*, 181 Colo. 411, 509 P.2d 1250 (1973); *Denver Urban Renewal Authority v. Pillar of Fire*, 191 Colo. 238, 552 P.2d 23 (1976).

The department has accepted appellants' assertion that section 42-2-106(3), C.R.S. 1973, imposes a burden on the free exercise of the religion followed by the appellants. Without a driver's license, appellants contend, they are unable to secure employment or to attend religious services. Weighed against these burdens are the compelling reasons that the state has asserted for requiring that appellants' photographs appear on any driver's license issued to them.

The department asserts that a photograph is a unique method of identification and assists in the identification of those who operate motor vehicles. Appellants contend that a driver's license which was marked by their thumbprint and

which contained their physical description would suffice. However, only a photograph can provide a police officer who makes a traffic stop with a ready and instantaneous means of determining that the person tendering the driver's license is indeed the person to whom the license was issued. *See* section 42-2-128(1), C.R.S. 1973. The exigencies of law enforcement cannot brook the delay inherent in other means of identification.

Moreover, the state asserts other interests besides those directly related to the function of a driver's license. The driver's license and the Colorado state "identification card," which also must bear the possessor's photograph, *see* section 42-2-403(1), C.R.S. 1973, are the only recognized state-wide means of ready identification. The department also maintains a file of the negatives from which the driver's license photographs are developed. The negatives provide a unique method of identification for use in police photographic line-ups and offer a means of identifying victims of natural disaster and traffic accidents.

The General Assembly, with an eye to the key role played by the driver's license in today's society, has endeavored to protect those who rely on the identification provided by a driver's license by exempting them from liability in section 42-2-112(5), C.R.S. 1973, in these words:

> "(5) Any other provision of law to the contrary notwithstanding, no liability or other sanctions shall be imparted to any person who relies upon the date of birth or identification as set forth on any license issued pursuant to this article if such date of birth or identification should be later proved incorrect or fraudulently entered upon said license."

The identification card which serves as an alternative means of identification to the driver's license is only issued to a person over eighteen years of age who does not have a Colorado driver's license. Section 42-2-401, C.R.S. 1973. Moreover, no person can operate a motor vehicle without having a valid driver's license in his possession and must display the license upon demand of a law enforcement officer. Section 42-2-113, C.R.S. 1973.

It is apparent that *Sherbert v. Verner, supra,* is a fundamentally different case than the one which is before us for review. The purpose of the regulatory scheme at issue in *Sherbert v. Verner* was to provide temporary relief for the involuntarily unemployed. The recognition of Sherbert's First Amendment claim did not conflict with the purpose of the requirement that she accept suitable work. In this case, photographic identification is an indispensable underpinning of the purposes underlying the state's interest in issuing driver's licenses. To provide exemptions would undermine its essential purpose. The ready certainty inherent in photographic identification would be lost. *Denver Urban Renewal Authority v. Pillar of Fire, supra,* at 25.

The regulations struck down in *Sherbert v. Verner, supra,* provided a working mechanism by which applicants for unemployment compensation could seek exemption for "good cause." *Id.* at 400, n. 3. No such mechanism is available here. The only state interest advanced in *Sherbert v. Verner* was the untested assertion that the impediment was necessary to forestall spurious claims for relief. More wide-ranging interests are at stake in this case. The regulatory program which was challenged in *Sherbert v. Verner* allowed an automatic exemption for those whose beliefs precluded work on Sunday. No such religious discrimination is present under section 42-2-106(3).

Finally, in the context of the regulations struck down in *Sherbert v. Verner, supra,* Sherbert could not be put to the choice of following those regulations or adhering to the dictates of her conscience. South Carolina was required to accommodate her beliefs. However, in this case, the state's interest in photographic identification is so compelling that the appellants' challenge must fall.

Accordingly, we affirm.

MR. JUSTICE PRINGLE dissents.

MR. JUSTICE CARRIGAN does not participate.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF COLORADO

No. 28171

DAVID JOHNSON, ANTHONY VIGIL, and BRENT PERKINS, Appellants, vs. MOTOR VEHICLE DIVISION, DEPARTMENT OF REVENUE, STATE OF COLORADO, Appellees.	)	Appeal from the District Court of the City and County of Denver

Upon consideration of the Petition for Rehearing filed by the Appellants in the above cause, and now being sufficiently advised in the premises,

It is this day ordered that said Petition be, and the same hereby is, Denied.

BY THE COURT, EN BANC, MAY 21, 1979.

MR. JUSTICE PRINGLE would grant.

xc: Richard M. Borchers, Esq.
Wayne E. Stockton, Esq.
3489 West 72nd Avenue, #201
Westminster, CO 80030

J. D. MacFarlane
Attorney General
Richard H. Forman
Assistant Attorney General
1525 Sherman Street, 3rd Floor
Denver, CO 80203

APPENDIX C

IN THE DISTRICT COURT
IN AND FOR THE CITY AND COUNTY OF DENVER
STATE OF COLORADO

Civil Action #C-72662

DAVID JOHNSON, ANTHONY VIGIL, and BRENT PERKINS, Plaintiffs, vs. MOTOR VEHICLE DIVISION, DEPARTMENT OF REVENUE, STATE OF COLORADO, Defendant.	)	SUMMARY JUDGMENT

The court finds there is no dispute as to any material fact and concludes that the defendant is entitled to a Summary Judgment as a matter of law.

The court reaches this legal conclusion after perusing the affidavit of Leonard A. Boydstun and considering the law cited by both sides.

In balancing the interests involved in the controversy between the parties, the affidavit of Leonard A. Boydstun shows a substantial interest on the part of the State in requiring that the photograph of the licenseee be on his or her driver's license and such requirement does not interfere with the free exercise of worship by members of the Assembly of YHWHHOSHUA, to which the plaintiffs belong. Pillar of Fire vs. Denver Urban Renewal Authority, 181 Colo. 411, 509 P.2d 1250.

DONE IN OPEN COURT this 5th day of May, 1978.

BY THE COURT:

/s/ George M. McNamara
GEORGE M. McNAMARA

Supreme Court, U.S.
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IN THE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF IN OPPOSITION

J. D. MacFARLANE
Attorney General

RICHARD F. HENNESSEY
Deputy Attorney General

MARY J. MULLARKEY
Solicitor General

DAVID K. REES
Chief, Appeals
Litigation Section

RICHARD H. FORMAN
Assistant Attorney General
General Legal Services Section

Attorneys for Respondent

1525 Sherman Street, 3rd Floor
Denver, Colorado 80203
Telephone: 839-3611

INDEX

	Pages
INTRODUCTORY STATEMENT	2
QUESTION PRESENTED FOR REVIEW	2
STATUTORY PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	
I. THE COLORADO SUPREME COURT RULED IN ACCORD WITH PRIOR DECISIONS OF THIS COURT REQUIRING THE STATE TO SHOW A COMPELLING STATE INTEREST TO JUSTIFY AN INFRINGEMENT OF THE RIGHT OF FREE EXERCISE OF RELIGION	4
II. THE COLORADO SUPREME COURT DECLINED TO FOLLOW THE INDIANA SUPREME COURT ON THE BASIS OF DIFFERING STATE INTERESTS	7
CONCLUSION	9

CASES

	Pages
Braunfeld v. Brown, 366 U.S. 599, 81 S. Ct. 1144, 6 L. Ed. 2d 563 (1960)	6
Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc., ___ Ind. ___, 380 N.E.2d 1225 (1978)	7
Gillette v. United States, 401 U.S. 437, 91 S. Ct. 828, 28 L. Ed. 2d 168 (1971)	6
Johnson v. Motor Vehicle Division, ___ Colo. ___, 593 P.2d 1363 (1979)	3

McDaniel v. Paty, 435 U.S. 618, 98 S. Ct. 1322, 55 L. Ed. 2d 593 (1978) 7

Reynolds v. United States, 98 U.S. 145, 25 L.Ed. 244 (1879) 6

Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963) 5, 6

Torcaso v. Watkins, 367 U.S. 488, 81 S. Ct. 1680, 6 L. Ed. 2d 982 (1961) 7

Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972) 5, 6

STATUTES

C.R.S. 1973, 42-2-106 (3) 2, 3

CONSTITUTION

United States Constitution, First Amendment 6

IN THE

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J. D. MacFARLANE
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MARY J. MULLARKEY
Solicitor General

DAVID K. REES
Chief, Appeals
Litigation Section

RICHARD H. FORMAN
Assistant Attorney General
General Legal Services Section

Attorneys for Respondent

1525 Sherman Street, 3rd Floor
Denver, Colorado 80203
Telephone: 839-3611

INTRODUCTORY STATEMENT

Respondent accepts petitioners' statement concerning jurisdiction. A full understanding of this case requires reiteration that the decision of the Colorado Supreme Court was entered on appeal from summary judgment entered by the trial court. The facts presented to the trial court were undisputed by the parties, but the legal significance of those facts was, of course, the subject of argument.

The facts presented in the statement of the case contained in the petition for writ of certiorari are not disputed by respondent. In order to place the arguments of this opposition brief in perspective, respondent will restate the statement of the case and restate the question presented for review.

QUESTION PRESENTED FOR REVIEW

Should the federal judiciary intervene in the decision of the Colorado Supreme Court that a compelling state interest in the use for identification of driver's license photographs justifies the state in denying driver's licenses to applicants whose religious beliefs prevent them from complying with Colorado's mandatory license photograph requirement?

STATUTORY PROVISION INVOLVED

Petitioners attack the constitutionality of Colorado Revised Statutes (C.R.S.) 1973, 42-2-106(3) which requires that each application for a Colorado driver's license, and each license issued, contain the photograph of the applicant or licensee.

STATEMENT OF THE CASE

Petitioners brought this action in the Colorado state courts seeking declaratory relief and a permanent injunction. They challenged as unconstitutional a practice of the Motor Vehicle Division, Colorado Department of Revenue (the "department") whereby the department will not issue a Colorado driver's license to an applicant who refuses to permit his photograph to be taken for use on the license. The department's policy is required by C.R.S. 1973, 42-2-106(3).

After the filing of the complaint and answer, petitioners served on the department requests for admission which were admitted. Petitioners then moved for summary judgment. The department responded by filing a cross motion for summary judgment, supported by an affidavit of Leonard A. Boydstun, chief of the enforcement section of the Motor Vehicle Division, Department of Revenue.

The trial court subsequently denied petitioners' motion for summary judgment. Petitioners then filed an affidavit of David Johnson, one of the petitioners. After hearing the arguments of counsel the trial court on May 5, 1978 entered summary judgment for the department.

Petitioners filed an appeal with the Colorado Supreme Court. On April 30, 1979 that court, one justice dissenting, affirmed the trial court's entry of summary judgment. *Johnson v. Motor Vehicle Division*, ___ Colo. ___, 593 P.2d 1363 (1979). Petitioner's motion for rehearing was denied on May 21, 1979.

Petitioners are members of an organized and recognized religious body known as the Assembly of YHWHHOSHUA. Their religious beliefs prohibit them from permitting photographs to be taken of themselves. Although petitioners are otherwise qualified to drive, the department has refused to issue them driver's licenses because petitioners will not permit photographs to be taken of themselves. These facts were admitted by the department, which did not contest either the content of petitioners' religious beliefs, nor their sincerity.

In support of its position, the department contended before the trial court and on appeal that the state has a compelling interest in the mandatory photograph require-

ment arising from the unique properties of a photograph for identification purposes. The factual basis for the department's contention was the affidavit of Leonard A. Boydstun, in which he states that the driver's license photograph is a unique means of identification because it can easily be used by persons without specialized training. He further states that the photograph is necessary to identify violators of the motor vehicle and other laws of Colorado, that it is necessary to identify victims of accidents and natural disasters and that it is necessary to protect innocent drivers against abuse of their driver's licenses.

Petitioners did not file any affidavits which contradicted Mr. Boydstun's statements. They did file an affidavit of David Johnson, one of the petitioners, which states that petitioners need to drive in the course of their employment to attend church services, and to transport others to church services. Mr. Johnson further states in his affidavit that he will not permit his photograph to be taken because it would violate his religious beliefs, that he would permit other means of identification to be used on a driver's license and that neither he nor the other petitioners have engaged in criminal activity.

REASONS FOR DENYING THE WRIT

I.

THE COLORADO SUPREME COURT RULED IN ACCORD WITH PRIOR DECISIONS OF THIS COURT REQUIRING THE STATE TO SHOW A COMPELLING STATE INTEREST TO JUSTIFY AN INFRINGMENT OF THE RIGHT OF FREE EXERCISE OF RELIGION.

In his opinion for the Colorado Supreme Court, Justice Erickson recognizes that the religious nature of petitioners' belief and practices is conceded, and their sincerity not questioned. The opinion then quotes from this court's opinion in *Wisconsin v. Yoder*. 406 U.S. 205, 92 S. Ct. 1526, 32 L.Ed 2d 15 (1972) that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of relegion." Justice Erickson concludes that the state may legitimately impose burdens on an individual's right of free exercise of religion but that the state has a substantial burden to justify that infringment:

> "In brief, the state must demonstrate that its policies are backed by a compelling state interest and that no alternative less restrictive of religious freedoms will serve."

A copy of the opinion of the Colorado Supreme Court appears in the petition for writ of certiorari.

Since the department concedes that the mandatory photograph requirement imposes a burden on petitioners' free exercise of religion, Justice Erickson examines in his opinion the nature of the state interest advanced by the department in support of the photograph requirement. The court acknowledges that only a photograph provides a police officer with a ready and instantaneous means of identifying the driver as the person whose license is tendered. The opinion recognizes that the general assembly of Colorado has provided for the use of the driver's license as a generally recognized statewide means of ready identification.

Concluding that the state has shown a compelling interest, Justice Erickson carefully distinguishes this Court's decision in *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963). He states:

> "It is apparent that *Sherbert v. Verner, supra,* is a fundamentally different case than the one which is before us for review. The purpose of the regulatory scheme at issue in *Sherbert v. Verner* was to provide temporary relief for the involuntar-

> ily unemployed. The recognition of Sherbert's First Amendment claim did not conflict with the purpose of the requirement that she accept suitable work. In this case, photographic identification is an indispensable underpinning of the purposes underlying the state's interest in issuing driver's licenses. To provide exemptions would undermine its essential purpose. The ready certainty inherent in photographic identification would be lost. (*cite omitted*)."

Justice Erickson also points out that unlike the unemployment compensation scheme in *Sherbert*, no mechanism for exemption exists in this case. The court states that more wide-ranging interests are involved in this case than the untested assertion raised in *Sherbert* and adds that no religious discrimination is present under the Colorado statutory scheme.

The legal principles applied by the Colorado Supreme Court to the circumstances of this case are consistent with those announced by this Court in considering the scope of protection afforded by the First Amendment to the United States Constitution. This Court has consistently held that in the exercise of its police powers the state may regulate the activities of individuals even though those activities are based on religious beliefs. *Gillette v. United States*, 401 U.S. 437, 91 S. Ct. 828, 28 L. Ed. 2d 168 (1971); *Braunfeld v. Brown*, 366 U.S. 599, 81 S. Ct. 1144, 6 L. Ed. 2d 563 (1960); *Reynolds v. United States*, 98 U.S. 145, 25 L.Ed. 244 (1879). Where a state requirement infringes upon a fundamental right of an individual the court must balance the interest of the state in its requirement against the burden placed on the individuals involved. *Wisconsin v. Yoder, supra*. The burden is upon the state, under such circumstances, to show a compelling state interest in its requirement. *Sherbert v. Verner, supra*.

This is not a case where the state restriction is directed primarily at religious beliefs. Contrast *Torcaso v. Watkins*, 367 U.S. 488, 81 S. Ct. 1680, 6 L. Ed. 2d 982 (1961). Rather the photograph requirement is directed primarily at status, acts and conduct, and the court properly engaged in weighing the interests of the parties. See *McDaniel v. Paty*, 435 U.S. 618, 98 S. Ct. 1322, 55 L. Ed. 2d 593 (1978).

The Colorado Supreme Court therefore ruled in accord with the decisions of this Court in requiring the department to show a compelling state interest in the photograph requirement. In deciding that the state interest was compelling the Colorado Supreme Court considered properties of the photograph which were never disputed by petitioners, except to contest their relevancy to the constitutional problem. The Colorado Supreme Court also considered portions of Colorado law establishing a state interest in the use of a driver's license for identification purposes which has not previously been considered by this Court. This Court should not now intervene in the decision of the highest state court of Colorado that there exists a compelling state interest in the use of a photograph on a driver's license for identification.

II.

THE COLORADO SUPREME COURT DECLINED TO FOLLOW THE INDIANA SUPREME COURT ON THE BASIS OF DIFFERING STATE INTERESTS.

While this case was pending before the Colorado Supreme Court, the Indiana Supreme Court considered this same problem and concluded on the basis of the interests presented by the state there, that a mandatory driver's license photograph requirement must fail where it infringed on the free exercise of religious beliefs. *Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc.*, ____ Ind. ____, 380 N.E.2d 1225 (1978). The Colorado Supreme Court de-

clined to follow the decision of the Indiana court.

Petitioners argue that the decisions of the two state courts are irreconcilable. Analysis of the state court opinions shows that state interests are raised in Colorado which were not considered by the Indiana Supreme Court. The Indiana court, like the Colorado court, concludes that the state must show a compelling state interest in its photograph requirement. Unlike the Colorado court, the Indiana court does not find the interest advanced by its Bureau of Motor Vehicles to be compelling.

The Indiana court feels that statistics included on a license, such as license number, height, weight, eye and hair color, are sufficient to serve Indiana's interest in identification. The Colorado court, based on the record before it, clearly disagrees that such statistics are an adequate substitute for a photograph. The opinion of the Indiana court reflects that it did not have before it the contention that a photograph is a unique means of identification. The Colorado court concludes that the use of a driver's license for identification is, pursuant to Colorado law, a matter of state concern and not simply a privilege to be waived by the license holder, as the Indiana court concludes. The Colorado court's conclusion is based upon provisions of Colorado law which limit the liability of residents who rely upon the use of a driver's license for identification, and the provision for identification cards for residents who do not have driver's licenses. If similar provisions exist in Indiana, they are not discussed by that court.

These disagreements do not reach constitutional dimensions, nor do they require the intervention of the federal judiciary to correct any fundamental disagreement as to applicable legal principles. In light of these apparent differences the two decisions are not irreconcilable as petitioners contend.

CONCLUSION

The department does not disagree with petitioners that issues raised by this case are very important ones. However, the fact that the issues are important does not mean that this Court should exercise its jurisdiction where the Colorado Supreme Court has ruled consistently with the decisions of this Court, and considered particular issues and circumstances which are properly matters of state interest. For these and all the other reasons set out in this brief, the department respectfully submits that this Court should deny the petition for writ of certiorari.

Respectfully submitted

J. D. MacFARLANE
Attorney General

RICHARD F. HENNESSEY
Deputy Attorney General

MARY J. MULLARKEY
Solicitor General

DAVID K. REES
Chief, Appeals
Litigation Section

RICHARD H. FORMAN
Assistant Attorney General
General Legal Services Section

Atorneys for Respondent

1525 Sherman Street, 3d Floor
Denver, Colorado 80203
Telephone: 839-3611
AG File No. CLS/79174/1MK